NO. 21,685

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[illegible] P. MONSMA,	)
	)
Appellant	)
	)
vs	)
	)
[illegible] MUTUAL INSURANCE COMPANY,	)
	)
Appellee	)
	)

BRIEF OF APPELLEE

[illegible] M. MILES, MOORE & HAYES
[illegible]neys for Appellee
[illegible]al Mutual Insurance Company
[illegible] Street
[illegible]horage, Alaska

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NO. 21,685

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT F. MONSMA,	)
	)
Appellant	)
	)
vs	)
	)
CENTRAL MUTUAL INSURANCE COMPANY,	)
	)
Appellee	)
	)

BRIEF OF APPELLEE

I

JURISDICTION AND PLEADINGS

This suit was originally commenced in the Superior Court, State of Alaska, Third Judicial District, at Anchorage, Alaska, by the Appellant, Albert F. Monsma, against the Appellee, The Central Mutual Insurance Company, and against The Glens Falls Insurance Company and the Kansas City Fire and Marine Insurance Company. (R. 3). In the Superior Court of the State of Alaska, the suit was designated as Civil Suit No. 65-1003D. (R. 3). Thereafter, and in accordance with the provisions of 28 U.S.C.A. §§ 1332 and 1441, the Appellee removed the case to the United States District Court for the District of Alaska at Anchorage, Alaska, and the case was thereafter designated as Civil Suit No. A-63-65. (R. 1, 19). This removal was based upon the undisputed fact that there was diversity of

citizenship between the Appellant and the Appellee and other defendants hereinbefore named and that the amount in controversy was in excess of $10,000.00 exclusive of costs and interest. (R. 2, 3, 8, 19).

On October 22, 1965, Appellant filed an Amended Complaint, (R. 125), and Appellee filed its Answer thereto on July 24, 1966. (R. 178). On August 2, 1966, a Judgment of Partial Dismissal was entered, dismissing the action as to all parties except the Appellant and Appellee herein. (R. 251). On August 16, 1966, Appellee filed a Supplemental Answer to Appellant's Amended Complaint. (R. 261).

Subsequently, on September 1, 1966, the matter came to trial (R. 292), and on September 9, 1966, the trial concluded with a Verdict for the Appellee. (R. 393, Supp. Tr. 5, 7). On September 22, 1966, Judgment for Appellee was entered. (R. 403). Subsequently, on September 27, 1966, Appellant moved for new trial. (R. 407). Such motion was denied on November 18, 1966, and Appellant brought the present appeal. (R. 430). Accordingly, this is a direct appeal from a final decision of the United States District Court, and this Court has jurisdiction pursuant to 28 U.S.C.A. §1291.

II

STATEMENT OF THE CASE

On January 16, 1965, a private dwelling located at 2200 C Street in Anchorage, Alaska was damaged by fire. (R.220). On that date, Appellant, Albert F. Monsma, was the contract purchaser of such property from Bailey E. Bell and Virginia Tallman Reis who each held an undivided one-half interest subject to Appellant's interest. (R. 59, 90, 92).

In 1961, Appellant had contracted to purchase the premises in question, and in 1963 he placed the title to same in the name of his now-divorced wife, whose present name is Marian M. Cox (hereinafter referred to as "Mrs. Cox"). (Tr. 31, 258). On August 24, 1964, Mrs. Cox contracted to purchase the fire insurance policy herein involved from Appellee through the Ken C. Johnson Agency. (Tr. 259). Mrs. Cox specifically requested that she be designated as policy beneficiary and her request was granted. (R. 178; Tr. 238, 260). Instead of paying the entire year's premium at the time she contracted to purchase the policy, Mrs. Cox paid one-half of the premium and promised to pay the balance within thirty days. (Tr. 238, 260). The Ken C. Johnson Agency was contractually obligated to Appellee to pay the entire year's premium. (Tr. 239-240). Neither Mrs. Cox, Appellant nor anyone

else ever paid the balance due on the policy. (Tr. 239, 240, 260). A divorce action was commenced in April of 1964 between Mrs. Cox and Appellant; subsequently, on September 24, 1964, a hearing was held with regards to this divorce action. (Tr. 259). On or about the same date, Mrs. Cox quit-claimed her interest in the premises to Appellant. (Tr. 262, 282-283). On or about September 26, 1964, Mrs. Cox informed Appellant that she had previously contracted to purchase the policy herein involved, and Appellant, since the premises had been quit claimed to him, gave Mrs. Cox a check to reimburse her for the one-half premium payment she had made. (Tr. 263-264). The Ken C. Johnson Agency, prior to the fire, did not know that Appellant had given Mrs. Cox this check, since Mrs. Cox never informed the Johnson Agency that she had received the check from Appellant. (Tr. 250, 264). Mrs. Cox thereafter went to the office of the Ken C. Johnson Agency and requested that the policy be assigned to the Appellant. (Tr. 241). And accordingly, an endorsement was added to the policy assigning it to Appellant. (Tr. 241, 242).

On December 23, 1964, Appellee, acting by and through its agent, the Ken C. Johnson Agency, mailed a notice of cancellation to Appellant at 2200 C Street, Anchorage, Alaska. (Tr. 179, 245, 319-320).

Mr. Norbert E. Segelhorst, Manager of the Ken C. Johnson Insurance Agency (Tr. 234), testified that on December 23, 1964, (Tr. 245), a notice of cancellation was mailed to Appellant at 2200 C Street, Anchorage, Alaska. and that two copies of the notice were mailed to the First National Bank, Eastchester Branch, Box 720, Anchorage, Alaska. (Tr. 245). He testified that the reason that two copies of the notice of cancellation were sent to the Bank was that the Bank had a real estate interest and mortgage interest in the property as well as the fact that they were an escrow agent for Virginia Tallman Reis and for Mrs. Cox. (Tr. 248). Mrs. Beverly Kirkpatrick, a fire insurance clerk at the Ken C. Johnson Agency (Tr. 317, 318), corroborated Mr. Segelhorst's testimony. She testified that she prepared the notice of cancellation and mailed it to Appellant at 2200 C Street. (Tr. 319). Furthermore, she testified that the signature on the certificate of mailing of the notice of cancellation was her signature. (Tr. 319). In addition, she affirmed that two copies of the notice of cancellation were mailed to the First National Bank of Anchorage. (Tr. 319). She stated that the date of mailing of the notice of cancellation was December 23, 1964, and that the effective date of the cancellation was to be January 4, 1965. (Tr. 320). Mr. Marwin L. Smith, manager of the First National Bank

of Anchorage (Tr. 196), further corroborated the testimony of both of the foregoing witnesses. He testified that the Bank received a copy of the notice of cancellation that was mailed to Appellant. (Tr. 199). Both Mr. Segelhorst and Mrs. Kirkpatrick testified that none of the notices of cancellation that were mailed were ever returned. (Tr. 248, 320). Mr. Segelhorst testified that the reason that the policy was cancelled was that the premiums had not been paid. (Tr. 248).

Mr. Segelhorst testified that Mrs. Cox informed the Ken C. Johnson Agency at the time of the "assignment" of the policy to Appellant that Appellant's address was Box 4-419, Spenard, Alaska. (Tr. 243). Bills and other documents sent to this Box number, however by the Ken C. Johnson Agency were returned. (Tr. 243, 250). The notice of cancellation was therefore mailed to Appellant at the insured's premises at 2200 C Street, Anchorage, instead of Box 4-419, Spenard. (Tr. 245, 319). Appellant admitted that this was the proper address to mail documents to him in Anchorage. (Tr. 126, 94, 99, 356). He had no post office box in Fairbanks and did not regularly check general delivery in Fairbanks. He had not used the Box 4-419 Spenard mailing address since 1960. (Tr. 122).

Mrs. Cox testified that when she moved from Anchorage she submitted to the post office a change of address card changing her address from 2200 C Street,

Anchorage, to Star Route A, Box 2006, Spenard. (Tr. 268-269). She unequivocally testified that she did not put her husband's name on the change of address card. (Tr. 269). Furthermore, she testified that in October of 1965, she submitted to the post office another change of address card changing her address from 2200 C Street to 13431 Brook Green Drive, Dallas, Texas. (Tr. 269). She again testified that on this latter change of address card she did not place her husband's name. (Tr. 269). Furthermore, the two change of address cards were admitted into evidence. (Tr. 270).

At the time that the notice of cancellation was mailed, Appellant was residing in Fairbanks. (Tr. 87). Furthermore, between November of 1963 and November of 1964, Appellant changed addresses in Fairbanks five times. (Tr. 88). However, he at no time submitted a change of address card to the post office, nor did he ever notify Appellee of his changed address. (Tr. 88, 95, 102).

However, Appellant testified that Fred Thomas, tenant at 2200 C Street forwarded Appellant's mail to him. (Tr. 357). At another point, Appellant testified that the Thomases impressed him as being responsible persons. (Tr. 127). At yet another point, Appellant testified that he was certain that if bills for the premiums had been mailed to him at 2200 C Street he would have received them. (Tr. 126). Moreover, he stated that 2200 C Street

was his last known Anchorage address and that "all his legal papers and all came to this address" and were forwarded to him. (Tr. 94). Furthermore, he testified that he knew he would have received any mail sent to 2200 C Street. (Tr. 126). In addition, he testified that he did receive various mail sent to 2200 C Street. (Tr. 356). He admitted that he described 2200 C Street in his deposition as his "home address". (Tr. 99).

Moreover, it appears that Appellant may have been in Anchorage during the week following the day when the notice of cancellation was mailed, and in contact with the tenants in the premises at 2200 C Street. Appellant testified that he was in Anchorage in December and talked to the Thomases. At first he stated that he believed that this was between the 15th and 20th of December. Subsequently, however, he admitted that he believed he was in Anchorage until "after Christmas". (Tr. 350). Thus, the jury might reasonably have inferred that Appellant actually received the notice of cancellation while visiting the Thomases during the week of December 23 to December 30th.

At one point, Mrs. Cox testified that she received the notice of cancellation that was addressed to Appellant at 2200 C Street, (Tr. 273, 275). Further, she testified that she opened the envelope containing the notice of cancellation addressed to Appellant, and

that she then retaped the envelope closed and remailed it to the sender. (Tr. 276). (Both Mr. Segelhorst and Mrs. Kirkpatrick testified that none of the notices of cancellation were returned (Tr. 248, 320)). However, in the pages of the transcript following page 276, the testimony of Mrs. Cox becomes thoroughly confused. She later testified that she did not really remember what she did with the notice of cancellation that was mailed to Appellant. (Tr. 277, 280). Furthermore, she revealed substantial confusion over whether or not she actually did receive a notice of cancellation mailed to Appellant at 2200 C Street. Her testimony seemed to admit of the possibility that what she did receive that was addressed to Appellant was in fact a billing for the premium or some other document instead of the notice of cancellation. (See generally Transcript 283-303).

In any event, there is no doubt whatsoever that Appellant had actual notice of the cancellation. Appellant admitted that he received a letter and/or a telephone call from Bailey E. Bell prior to the fire advising him of the cancellation. (Tr. 62, 63, 67, 352). Mr Bailey E. Bell was an Anchorage attorney, who was one of the original plaintiffs in this action, and who, on at least one occasion signed pleadings on behalf of Appellant. (R. 132). Other evidence, including the testimony of Mr. Bell also clearly establishes that he

received such a letter and telephone call, (Tr. 62, 63, 67, 335, 337, 340-341), and indeed, Mr. Bell's letter was admitted into evidence for whatever weight it was entitled to on the question of whether Appellant had notice of the cancellation. (Tr. 71).

Appellant admits that Bailey E. Bell advised him in both a letter and a telephone call that he had purchased a new or substitute policy in the amount of $15,000.00, (Tr. 335), and that he (Bell) would look to Appellant for payment of premiums on the substitute policy. (Tr. 352). Evidently Appellant acquiesced in this demand. Appellant never made any attempt to contact the Ken C. Johnson Agency or to purchase other insurance between the time he was contacted by Mr. Bell and the time of the fire. (Tr. 115). At one point in his pleadings, Appellant admitted that Bailey E. Bell was his agent in procuring the substitute policy. (R. 130). The substitute policy was issued jointly by the Glens Falls Insurance Company and The Kansas City Fire and Marine Insurance Company, and had as named insureds Virginia Tallman Reis, Bailey E. Bell, and Appellant. (Tr. 336). Appellant admitted that he felt that the substituted policy was sufficient, (Tr. 75, 353) and that he felt that the policy issued by Appellee was replaced by the policy which Bailey E. Bell had purchased from the Glens Falls and Kansas City companies. (Tr. 353). One of Appellant's admissions in his deposition makes this

quite clear:

> Q. I mean between January 7th and January 16th, did you make any inquiries, contact any insurance agents, in any way seek to either get a policy, a new policy or make sure that this was reinstated or anything of that nature?
>
> A. Bailey's was in effect. (Tr. 354).

In addition to making the instant claim against Appellee insurance company, Appellant also claimed against the Glens Falls and Kansas City policy. (R. 127). Subsequently, a settlement was effected with Glens Falls Insurance Company, and the Kansas City Fire and Marine Insurance Company for $12,500.00 and it was stipulated between Appellee and Appellant that any recovery from Appellee would be reduced by that sum. (R. 265).

Appellee has at all times maintained that if there were any defects in the cancellation, they were waived by Appellant by his bringing a claim against Glens Falls and Kansas City and/or by his acceptance of the Glens Falls and Kansas City policy as a substitute for the cancelled policy issued by Appellee. (R. 277 et. seq.)

On September 1, 1966, the trial court ordered that proposed instructions be submitted to the court and served upon opposing counsel not later than 4:00 P.M. on September 6, 1966. (R. 290). On September 8, 1966, both Appellee and Appellant submitted additional proposed

instructions, among which was Appellee's Additional Proposed Instruction No. 27. (Tr. 376). The trial judge waived time limits on proposed instructions and allowed them to be submitted on September 8, 1966. (Tr. 376). Appellant certified that he received Appellant's Additional Proposed Instruction No. 27 on September 7, 1966. (R. 330).

On September 8, 1966, between 11:03 A.M. and 11:10 A.M., the trial judge informed both counsel of his proposed action on their requested instructions. (R. 338, Tr. 371). On September 8, 1966 between 12:45 P.M. and 1:30 P.M. counsel stipulated that the trial jury retire to consider their verdict and that objections to the court's instructions be taken as of record as though they had been taken prior to the time the jury retired. (Tr. 372, R. 338). On September 8, 1966, at 1:30, the jury, after being duly instructed, retired, taking with them the court's instructions which did not include Appellee's Additional Proposed Instruction No. 27. (R. 338). On September 8, 1966 between 3:35 and 4:10, pursuant to the stipulation of counsel, objections to the court's instructions were heard. (R.339). Counsel for Appellant expressly agreed to the hearing of these objections at 3:30 P.M.:

> THE COURT: Counsel, I don't want to rush you on objections. Would you rather come back at 3:15 or 3:30 and take your time making objections.

MR. TALLMAN: That would be ok with me, your Honor ... (Tr. 373).

At about 3:45 P.M., counsel for Appellee objected to court's failure to instruct on the issue of novation. (Tr. 375, R. 339). Then counsel for Appellee objected to the court's failure to instruct the jury in accordance with Appellee's Additional Proposed Instruction No. 27, (Tr. 375), the text of which was:

> "You are instructed that there is a presumption that letters mailed in the ordinary course of the mails reach the address to which they are addressed." (R. 331).

The court informed counsel that it had intended to give that instruction but had inadvertently failed to do so (Tr. 379) and that it might yet submit that instruction. (Tr. 376, 379) At or about 4:30 P.M., the court, having prepared Supplemental Instruction No. 1, predicated upon Appellee's Additional Proposed Instruction No. 27, indicated that it would submit the supplemental instruction to the jury. (Tr. 380, 382; R. 339). At this time, Appellant objected to the submission of Supplemental Instruction No. 1 on the ground that it was belatedly offered and that the submission of it to the jury after they had retired would place undue emphasis on it. (Tr. 380). At no point did Appellant object to the the instruction on the ground that it incorrectly stated the law or that it should not be submitted because of

testimony, which if believed, would rebut the presumption. (Tr. 380). Subsequently at 4:45 P.M., the instruction was submitted to the jury. (Tr. 382; R. 339). The jury was not returned to the jury room to have the instruction read aloud to them, counsel for Appellant agreeing that it would be better to merely hand the instruction to the bailiff to hand to the jury without a reading of it. (Tr. 380, 382). Supplemental Instruction No. 1 contained a cautionary instruction as follows:

> The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.
>
> You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to the case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law. (R. 391).

The court initially submitted the necessary general verdict forms to the jury along with a special verdict form containing five interrogatories. (R.395-396). One of the interrogatories was Interrogatory No. 3:

> "Did the plaintiff prior to the fire enter into a novation with the defendant insurance company as defined in the instructions?" (R. 396).

There was, however, no instruction submitted to the jury defining the word "novation". (R. 341 - 391, esp. R. 388). This was because this court had decided not to submit this issue to the jury, and the failure to eliminate Interrogatory No. 3 was a secretarial oversight. (Supp. Tr. 4).

Appellant objected generally to the giving of the special verdict form:

> "I would object to the special verdict because I don't feel that there has been a showing as to why we should have this ..." (Tr. 378-379).

However, Apellant did not object specifically to Interrogatory No. 3 nor did he object to the submission of the special verdict on the ground that it would mislead and confuse the jury and would over-emphasize some issues more than others. Appellant did, however, object specifically to Interrogatory No. 4:

> "If there were any defects in the method of cancellation, did plaintiff waive such defects." (R. 396).

His objection was grounded on his claim that there was no evidence of any waiver of cancellation. (Tr. 379).

On September 9, 1966, the jury returned a General Verdict for Appellee; however, they had not answered the Special Verdict Interrogatories. (Supp. Tr. 2). Appellee's counsel waived the answering of the Special Interrogatories but Appellant's counsel insisted that they be answered. (Supp. Tr. 2). Accordingly, the jury was

directed to further deliberate and answer the Special Interrogatories. (Supp. Tr. 3). At that point, the jury foreman asked:

> "On the word 'novation', in one question, does that mean to approach or make a beginning?" (Supp. Tr. 3).

The court replied as follows:

> Through error that that was not changed, it was not changed on the copy submitted to the jurors. There are now four interrogatories, and there were previously five. They were changed to four in accordance with instruction No. 42, and that was properly put in the set of instructions given to the court. The second page of the special verdict asked a question with reference to novation but the court by its instruction removed that issue. I held it wasn't an issue in the case, and I refused 3 or 4 instructions which were requested pertaining to that. But my secretary did not change the 2d page and insert the changed page as page No. 2. I have done that now, so insofar as the word "novation" or anything pertaining to novation during the course of the trial, you are instructed to entirely disregard that because the Court decided it was not material. (Supp. Tr. 4).

Following these comments by the trial judge, the jury, at 10:15 A.M., retired to deliberate on the answers to the interrogatories. At 11:25, A.M., a mere one hour and ten minutes after retiring, the jury returned the Special Verdict answering all interrogatories in favor of Appellee. (Supp. Tr. 5; R. 340). Appellant then orally moved the trial court to declare a mistrial on the grounds

that the jury had been unduly confused by the interrogatories and by the belated offering of Supplemental Instruction No. 1. (Tr. 6 and 7).

On September 22, 1966, the court denied Appellant's motion for mistrial (R. 398) and judgment for Appellee was entered. (R. 403). On September 27, 1966, Appellant moved for new trial. (R. 407). Such motion was denied on November 18, 1966, and the present appeal followed. (R. 430).

III

SUMMARY OF ARGUMENT

ARGUMENT NO. 1

Appellee contends that the trial court did not prejudicially err by submitting Supplemental Instruction No. 1 to the jury after it had retired to consider its verdict. Several well-considered cases have held, under factual circumstances similar to those of the case at bar, that the belated submission of an inadvertently omitted instruction is proper where a cautionary instruction, similar to the one given in the case at bar, is given at the time that the belated instruction is submitted. Appellee further contends that the innocuous fashion in which the instruction was given surely prevented the jury from giving the instruction undue emphasis. (infra 22-29).

In addition, Appellee contends that Supplemental

Instruction No. 1 properly stated the law, and that there was sufficient evidence that the notice of cancellation had been mailed to render the submission of the instruction proper. Moreover, Appellee contends that the submission of the instruction was not rendered improper by the fact that Appellee denied receiving the notice of cancellation.

(infra 30-36)

However, even if the instruction was improperly given because it was belatedly submitted or because it improperly stated the law, the error was a harmless one, since the jury specially found in Appellee's favor on a separate issue upon which the contested instruction was not material.

(infra 36-38)

Lastly, Appellee contends that its Additional Proposed Instruction No. 27 was not untimely offered. However, even if it was untimely offered, the trial judge did not commit error in accepting it for consideration, since the case law indicates that the judge had a wide discretion in accepting untimely offered proposed instructions.

(infra 40-41)

ARGUMENT NO. 2

Appellee contends that the trial court did not commit reversible error by submitting to the jury the special interrogatory concerning novation, even though no instruction defining the term "novation" was submitted to the jury. There is absolutely no reason to believe

that the jury was unduly confused by the submission of the interrogatory. On the contrary, there is substantial reason to believe that the jury was not confused, since it did not answer the novation interrogatory and, since the jury's eventual answers to the properly submitted interrogatories were completely consistent with its general verdict. In any event, substantial case law exists holding that similar errors by trial judges are not prejudicially erroneous. (infra 42-46)

Furthermore, since counsel for Appellant did not specifically object to the submission of the interrogatory in question, he ought to be held to have waived the objection he now seeks to assert. (Infra 42-43)

ARGUMENT NO. 3

Appellee contends that Instruction No. 15 pertaining to waiver properly stated the law. However, Appellee urges that Appellant ought not be allowed to urge that Instruction No. 15 incorrectly states the law, since Appellant failed to include this objection as a ground for appeal in either his Motion for New Trial, his "Statement of Points Upon Which Appellant Intends to Rely", or in his "Specification of Errors" contained in his instant brief and since it is entirely unclear in Appellant's brief whether in fact Appellant in fact wishes to argue this point. (infra 47-51)

Appellee further contends that there was suffi-

cient evidence that defects in the notice of cancellation had been waived to warrant the submission of Instruction No. 15 pertaining to waiver. (infra 52-53)

In any event, even if Instruction No. 15 erroneously stated the law, a reversal is not warranted, since the jury specially found in Appellee's favor on a separate issue upon which Instruction No. 15 was not relevant. (infra 53-54)

Appellee further contends that the jury's answers to Interrogatories No. 4 and No. 5 were consistent. By its answer to Interrogatory No. 4, the jury found that Appellee properly cancelled the insurance policy. By its answer to Interrogatory No. 5, it found that, even assuming that there were defects in the method of cancellation, plaintiff waived such defects. The jury, by its answer to Interrogatory No. 5, thus did not assert that there were in fact any defects in the method of cancellation, but merely that, assuming there were such defects, they were waived. Since the United States Supreme Court has held that the courts have a strong duty to take that view of the case which makes the jury's answers to special interrogatories consistent, it is clear that the court should construe the answers to the interrogatories in the manner heretofore suggested and thereby find them to be consistent. (infra 54-55

Lastly, Appellee contends that the defense of waiver was implicitly pleaded as an affirmative defense. Moreover, Appellee contends that Appellant, by not raising this point at any previous time, has waived his right to assert this point. Furthermore, Appellee contends that the issue of waiver was tried by implied consent of the parties, and that therefore, under Rule 51 of the Federal Rules of Civil Procedure, the issue of waiver should be treated in all respects as if it had been raised in the pleadings.

(infra 55-57)

ARGUMENT NO. 4

Appellee contends that, since Appellant did not object to the submission of the interrogatories on the ground that they were misleading, confusing and ambiguous Appellant has waived his right to urge this point on appeal. Furthermore, Appellee contends that Appellant waived any objections to the submission of the interrogatories when he insisted that the jury be ordered to answer them.

(infra 57-60)

Appellee contends that Appellant entirely misconceives the law when he further argues that the trial court should not have submitted any interrogatories because no special showing was made indicating that the interrogatories were necessary. Rule 49(b) of the Federal Rules of Civil Procedure indicates that the question of whether to submit interrogatories to the jury is left

to the discretion of the trial judge, and Appellant has completely failed to show that this discretion was abused by the trial judge.

(infra 60-61)

IV

ARGUMENT

I.

THE COURT COMMITTED NO ERROR IN SUBMITTING TO THE JURY SUPPLEMENTAL INSTRUCTION NO. 1, AFTER THE JURY HAD RETIRED.

On page 14 of his brief, Appellant urges that the jury was unduly influenced by the trial court's submission of Supplemental Instruction No. 1 to it after it had retired. The instruction in question stated:

> You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.
>
> The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.
>
> You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law. (R. 391).

Appellant cites no cases and offers only the slimmest argument in support of his bare conclusion that the jury was unduly influenced. The thrust of Appellant's argument seems to be that there was no evidence that Appellant did receive the notice of cancellation and therefore, since the jury found that Appellant did receive the notice of cancellation, it must have been unduly influenced by the instruction.

Appellee urges, on the contrary, that there was substantial evidence that Appellant received the notice of cancellation. The evidence is overwhelming and uncontradicted that the notice was mailed to Appellant at 2200 C Street. One of the employees of the Ken C. Johnson Agency testified that the notice was mailed. (Tr. 245), and Mrs. Kirkpatrick, also an employee of the Agency, signed a certificate of mailing at the time she mailed the notice. (Tr. 319-320). Furthermore, other individuals having interests in the property covered by the insurance policy received notices of cancellation. (Tr. 177, 199-201, 273). Moreover, there is substantial circumstantial evidence that Appellant received the notice. Appellant testified that he knew he would have received any mail sent to 2200 C Street, (Tr. 126) and that he did in fact receive various mail sent to 2200 C Street. (Tr. 356). He further testified that 2200 C Street was his last known Anchorage address and that all of his legal papers and other matters were

sent to this address and forwarded to him by Fred Thomas, the tenant at 2200 C Street. (Tr. 94,357).

In the light of the above-mentioned evidence, it is difficult to conceive that Appellant can now seriously urge that there is a complete lack of evidence that Appellant received the notice of cancellation. Furthermore, Appellant's argument that the jury must have been swayed improperly by the instruction in question since it found in Appellee's favor even though there was no evidence of receipt of the notice, must fail.

In any event, substantial case law exists holding that the belated submission of an inadvertently omitted instruction is proper where a cautionary instruction such as the one given by the trial judge in the case at bar, is given to the jury at the time the formerly omitted instruction is given.

In Davis v. Erickson, 53 Cal. 2d 860, 350 P.2d 535 (1960), a ski student brought suit against the operator of a ski school for personal injuries sustained when he was struck by another skier while taking ski lessons. After deliberating for some time, the jury requested that all of the instructions be reread. The trial judge reread all but one of the instructions, inadvertently failing to reread that one instruction. The Appellate court held that the failure to reread the one instruction was prejudicially erroneous. The court then stated:

> The argument that to recall the jury to read the omitted instruction would have overemphasized their contents is not persuasive. The court could have admonished the jury not to attach any particular emphasis to the fact that it was reading certain instructions which had been inadvertently omitted in its first reading, thereby protecting despondents from any prejudice in the court's correcting its previous oversight ... (350 P.2d at 538).

In Stoddard v. Rheem, 13 Cal. Rptr. 496 (1961), plaintiff brought suit for wrongful death. The trial judge inadvertently neglected to submit to the jury an instruction concerning the question of whether the decedent had been exercising due care at the time of the accident. Ten minutes after the jury retired, the trial judge called them back and read the instruction to them with the following explanation:

> Ladies and gentlemen, in reading these instructions this morning, I have to apologize because one of the instructions apparently was stuck to one of the others and was not read by me ... (13 Cal. Rptr. at 498).

The Appellate court held there was no error and stated:

> The explanatory remarks of the judge were not calculated to focus undue attention upon the subject of the instruction. Those remarks, coupled with the cautionary instruction earlier given, "not to select a single instruction, or a portion of any instruction alone, but to consider all of the instructions in determining this case ...," tended to counteract any element of over-emphasis which might otherwise have stemmed from the delayed and separate treatment of the subject of this instruction ...

> The absence of error in [this] case is emphasized by the fact that it would have been reversible error if the court had refused to read the instruction in question. (13 Cal. Rptr. at 498-499).

It should be noted that, as in the Stoddard case, (supra), the trial judge in the case at bar submitted several general cautionary instructions in his initial charge to the jury, warning the jury that it was not to single out any one particular instruction and that the order in which the instructions were submitted had no significance as to their relative importance. (R. 344, 381).

In Greitz v. Sivachenko, 143 Cal. App. 2d 146, 299 P.2d 374, (1956), plaintiff brought suit for personal injuries and recovered $9,500.00. Shortly after the jury retired to deliberate, the trial judge discovered that he had inadvertently neglected to submit an instruction on damages. Accordingly, the jury was recalled, and the omitted instruction was read to them. Before giving the instruction, the trial judge stated:

> "The fact that I give it now is not meant to emphasize anything, but it should have been given in its proper place."

After giving the instruction, he again admonished the jury:

> "You are not to speculate because I gave it to you at this later time that you are to give the plaintiff damages just because I brought this to your attention."

The Appellate court held:

> "Clearly there is no merit in the claim that appellant was in any way prejudiced by the giving of this instruction a few minutes after the jury retired." (299 P.2d at 376).

In City of Philadelphia v. London, 293 F.2d 926 (3d Cir. 1961), plaintiff brought suit against the City for personal injuries sustained when a truck owned by the City collided with a passenger car in which plaintiff was riding. London was the driver of the passenger car and was brought into the suit as a third party defendant by the City. Subsequently, a settlement was reached with the plaintiff. However, the third party claim by the City against London remained and was brought to trial. Several hours after the jury had retired, they still had not reached a verdict, and the judge therefore called them back and exhorted them strongly to try to reach a verdict. After his exhortion, the judge ordered the jury back to the jury room for further deliberations. In addition, he reminded them to take back with them photographs of the scene of the accident and of the vehicles involved in the collision. Subsequently, a verdict and judgment were rendered in the City's favor. London appealed, contending that the judge unduly emphasized the photographs and therefore distorted the presentation of the case to the jury. In affirming the judgment, the court merely stated:

"While there is some repetition of the fact that the jury had pictures to look at, we think that on the whole, the case was fairly before them."

Also see Fredericks v. American Export Lines, 227 F.2d 450 (2d Cir.), cert. den. 350 U.S. 989, 76 S.Ct. 475, 100 L.ed. 855 (1955); Polara v. Trans World Airlines, 284 F.2d 34, (2d Cir. 1960); Mutual Service Cas. Ins. Co. v. Overholser, 58 NW 2d 268, (Minn. 1953); Warmuth v. Greenberg, 49 So. 2d 793, (Fla. 1951); Gunderson v. All America Commerce Corp., 275 App. Div. 572, 90 NYS 2d 3 (1949).

It should be noted that counsel for Appellant conceded that the jury deliberated late into the night of September 8. (Supp. Tr. 7). Inasmuch as Supplemental Instruction No. 1 was submitted to the jury at about 4:30 P.M. of that same day, (R. 339), it seems exceedingly doubtful that the jury was unduly swayed by the instruction. One would expect that the jury would have returned very soon after the submission of the instruction if they were in fact improperly swayed by its belated submission to them.

Finally, the method by which the instruction was given to the jury renders it doubly improbable that they were improperly swayed. The bailiff merely handed the instruction to the Jury Foreman without comment or explanation, (Tr. 380, 382), a mode of proceeding vir-

tually certain not to arouse undue attention.

Appellant wishes to argue on this appeal that Supplemental Instruction No. 1 did not properly state the law. (Br. 18). Also, he evidently wishes to argue that the instruction should not have been given because there was testimony which, if believed, would have rebutted the presumption. (Br. 20). However, it must be noted that Appellant did not object on either of these grounds in the trial court and has therefore waived such objection. Rule 51 F.R.C.P; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.ed. 645 (1942); Hargrave v. Wellman, 276 F.2d 948 (9th Cir. 1960). Appellant seeks to avoid this rule of law by asserting that he did not have sufficient time to phrase a proper objection. (Br. 15). Indeed, he asserts that he had "only a matter of seconds or at most minutes" before stating his objection to the instruction. (Br. 18). Appellant is seriously mistaken. The record shows that at about 3:50 P.M. the trial judge indicated that he might submit Appellee's Additional Proposed Instruction No. 27. (R. 339; Tr. 374-376). Then, at 4:25 P.M., the trial judge announced his decision to submit the instruction. (R. 339). Moreover, Appellant did not ask for any additional time to consider the instruction.

In any event, the record indicates that counsel for Appellant certified that he received Appellee's

Additional Proposed Instruction No. 27, upon which Supplemental Instruction No. 1 was based, on September 7 - one day prior to the time that it became necessary for Appellant to make his objection to the instruction.

Additionally, it must be noted that counsel for Appellant did not allege the present grounds for objection in either his "Statement of Points Upon Which Appellant Intends To Rely", (R.433-434) or in his "Specification of Errors" in his present brief. (Br. 9-10). Therefore, for these additional reasons Appellant ought not to be allowed to urge the present grounds for objection. Rule 18(2)(d) United States Courts of Appeals Rules, Ninth Circuit; Lee v. United States, 238 F.2d 341 (9th Cir. 1956).

In any event, however, there is no doubt whatsoever that Supplemental Instruction No. 1 properly stated the law and was properly submitted even though there was testimony which, if believed by the jury, would have rebutted the presumption.

The jury was properly instructed elsewhere as to the effect to be given to a presumption where contrary evidence is introduced:

> A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary;

but unless so outweighed the jury are bound to find in accordance with the presumption. (R. 371).

This was a stock instruction taken from Mathes and Devitt, Federal Jury Practice and Instructions, (1st ed. 1965) §71.04, and is supported by numerous cases cited at the end of that section. It was not objected to by counsel for the Appellant.

Professor McCormick very clearly sets forth the law on this matter:

> Let us suppose that a party proves due mailing of a letter, properly addressed, bearing a return address, and that it was never returned. Not only does this create a technical legal presumption, conclusive if contrary evidence is not adduced, that the letter was duly delivered to the addressee, but if the evidence is believed, it creates a probability, which measured by experience makes the odds overwhelming in favor of due delivery... But suppose this is not all we know. Suppose the addressee takes the stand and testifies unequivocally that he did not receive the letter... The testimony of the addressee "that he did not receive the letter is undisputed, we assume, by any direct testimony of anyone who asserts that he did receive it. Is it for this reason to be accepted as conclusive by all reasonable men, and must the judge accordingly direct the jury to find, contrary to the presumption, that the letter was not received? Despite some early cases when mails were less regular, and others where the balancing factors were not recognized, the answer today is clear. The issue is ordinarily for the jury. It seems that the need here

> is imperative for an instruction upon the presumption... (McCormick on Evidence,(1st ed. 1954) §311, p. 650. (emphasis added).

Several pages later, Professor McCormick states convincing reasons why the instruction on the presumption ought to be given even where testimony has been introduced which, if believed by the jury, would rebut the presumption:

> ... as to some presumptions, the custom of informing the jury in some fashion of the rule of presumption is well-nigh universal ... (T)he presumption of receipt of a letter from due mailing (is an) instance ... (T)he digests give abundant evidence of the widespread and unquestioning acceptance of the practice of informing the jury of the presumption despite the fact that countervailing evidence has been adduced upon the disputed inference.
>
> It seems to me that the practice is wise and indeed almost necessary ...
>
> (Instructions on presumptions) can give the jury substantial aid in avoiding mistakes in difficult cases. A presumption is a rule which has the effect that from certain circumstances a certain inference may be drawn. Persons unaccustomed to weighing evidence and particularly persons of limited intelligence are notoriously suspicious of circumstantial inferences. Such persons, on the other hand are prone to be overcredulous of direct testimony. If a party having the burden of persuasion, then, must rest upon circumstantial evidence to prove an issuable fact, there is danger that the jury reading the burden of proof charge will mistakenly suppose that the circumstantial inference, especially if countered

> by direct testimony, could not be "a preponderance of the evidence." McCormick on Evidence, (1st ed. 1954), §316, pp. 667 to 668.

Indeed, Appellant has cited no authority contrary to the well-respected views of Professor McCormick. In fact, a portion of the material which Appellant has cited from Wigmore's treatise is in accord with Professor McCormick's views and hence in Appellee's favor:

> (a) Where the issue is whether the letter was received by the addressee, it often occurs that the addressee's testimony denies the arrival and receipt. This being some evidence to the negative of the issue, the binding effect of the presumption ends, and the issue goes to the jury to decide upon the weight of the evidence. On this point a court is occasionally found holding that the uncontradicted testimony of the addressee denying the receipt "entirely negatives the presumption," and that therefore the jury cannot find for the receipt; which is, of course, unsound because the jury may not believe the denial, as other courts have pointed out. (Wigmore on Evidence, 3d ed. 1940), §2519(B); (emphases added).

A clear implication from the above statements of Wigmore is that the instruction on the presumption ought to be given even where there is testimony denying receipt. It is only the binding effect of the presumption that is destroyed when contrary testimony is introduced. But since the jury may disbelieve that testimony, the presumption may still be called into operation, and therefore the

instruction ought to be given.

The recent Alaska case of Hartsfield v. Carolina Cas. Ins. Co., 411 P.2d 396 (Alaska 1966) is not contrary to the views of Professor McCormick. In that case, the court stated:

> "The denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact." (411 P.2d at 400).

It is clear that the Alaska Supreme Court used the term "prima facie case" in the manner in which Wigmore defined it:

> ...the term is applied to the stage of the case ... where the proponent, having the burden of proving the issue (i.e., the risk of non-persuasion of the jury), has not only removed by sufficient evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. Wigmore on Evidence (3d ed. 1940), §2494, p. 293.

Thus, as is indeed apparent from the facts of the case, the statement of the Alaska Supreme Court means only that a denial of receipt prevents the proponent of the presumption from obtaining summary judgment. However, the opinion in no way implies that an instruction on the presumption should not be given where there is testimony of

non-receipt in the case.

The only other authority that Appellant cites as supporting his position is the case of Keeling v. Travelers Ins. Co., 67 P.2d 944 (Okla. 1937), and that case does not in fact support Appellant's position. The case did not hold that no instruction on the presumption should have been given. It held only that a verdict should not have been directed, and that the issue should have gone to the jury. Indeed, one statement of the court strongly implies that the instruction on the presumption should be given since it would be advantageous to both parties;

> That presumption arising from the known regularity of the United States mail service is as available for the supposed receiver of a letter as for the alleged sender thereof. If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course..., so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted. (67 P.2d at 945).

Additionally, it must be noted that Supplemental Instruction No. 1 was not as strong as the law would allow. The instruction stated only that proof of mailing gives rise to the presumption that the letter reached the address to which it was mailed, (R. 391), but, as Professor McCormick and Wigmore have pointed out, proof of mailing raises

the presumption that the letter was received by the addressee. Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.ed 861 (1931); Rosenthal v. Walker, 111 U.S. 185, 4 S.Ct. 382, 28 L.ed 395 (1883); McCormick on Evidence (1st ed. 1954), §311, p. 650; Wigmore on Evidence (3d ed. 1940), §2519(B).

Finally, it must be noted that even if the instruction was improperly given because it was belatedly submitted or because it improperly stated the law, the error was a harmless one. The jury found in Appellee's favor on two separate and independent grounds. It found that the insurance policy was cancelled, and on this issue the contested presumption was material. (See Interrogatory No. 3, R. 394). But it also found that if there were any defects in the method of cancellation, they were waived by the Appellant, (See Interrogatory No. 4, R. 394), and on this issue, the contested presumption was not material. Such being the case, the fact that there was error in the instruction pertaining to the issue of whether or not there was a proper cancellation does not require a reversal, because the jury found separately and independently of that issue that any defects in the cancellation were waived. Holloway v. Dunham, 170 U.S. 615, 18 S.Ct. 784, 42 L.ed 1165 (1898) is squarely in point. In that case, plaintiff brought suit to recover the value of goods sold and delivered by plaintiff to defendant.

The action was brought in the Territory of Oklahoma. Defendant, at the time of commencement of the suit was a resident of Texas. Plaintiff therefore commenced attachment proceedings against defendant on the ground that he was at that time a non-resident of the Territory of Oklahoma. A second alleged basis for the attachment proceedings was plaintiff's contention that defendant was about to fraudulently convey the property sought to be recovered. The trial judge ordered the jury to return a general verdict, but also submitted the following interrogatories to the jury:

> "1) Was [defendant] ... about to sell and convey or otherwise dispose of his property subject to execution, with intent to cheat, hinder, and delay his creditors?
>
> 2) Was [defendant] ... a non-resident of Oklahoma Territory?"

The jury, in returning a verdict for plaintiff answered both interrogatories in the affirmative. On appeal to the United States Supreme Court, defendant contended that the trial judge's instruction as to what constituted a non-resident was in error. In affirming the judgment, the Court reasoned:

> ...we think it is not material now to inquire as to the correctness of the charge of the court in relation to the question of defendant's non-residence. If he were a non-resident when the attachment was issued it could be sustained on that ground. But it could also be sustained if at

> the time it was issued the defendant was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder, and delay his creditors. So there were two facts entirely separate and distinct from each other, either of which being found to exist would justify and support the attachment.
>
> The jury having found that the defendant at the time the attachment was issued did intend to convey his property, and thus cheat his creditors, that fact is conclusive upon this court, and, being in itself sufficient to uphold the attachment, without reference to the other fact of the defendant's non-residence, a complete answer is furnished to any alleged error in the instruction of the court as to what constitutes a non-resident.
>
> Whether the court erred in charging the law in relation to non-residence is therefore immaterial. There is no such connection between the two grounds upon either of which the attachment could be supported, that an error in the charge of the court in regard to one can be said to affect the other, and thus furnish cause for a new trial. (170 U.S. at 618).

Also see Odekirk v. Sears Roebuck & Co, 274 F.2d 441, (7th Cir.) cert. den. 362 U.S. 974, 80 S.Ct. 1060, 4 L.ed. 2d 1011 (1960); United States v. Six Dozen Bottles, etc., 158 F.2d 667 (7rh Cir. 1947); Larson v. General Motors Corp., 148 F.2d 319 (2d.Cir.), cert. den. 326 U.S. 745, 66 S.Ct. 34, 90 L.ed 445 (1945).

In conclusion, the instruction properly stated the law and was properly submitted to the jury, even

though there was testimony which, if believed by the jury, would have rebutted the presumption. But even if there was error, it was harmless error because of the separate and independent additional finding of the jury which was in itself sufficient to support the verdict.

Another point which Appellant apparently urges under his Specification of Error No. 1 is that the trial judge committed error by not informing counsel of his proposed action upon the parties' requests for instructions prior to the time that the jury retired. (Br. 16-17). However, the record clearly shows that the trial judge did inform both counsel of his proposed action upon their requests for instructions (R. 338, Tr. 371). Moreover as several cases have pointed out, the purpose of Rule 51 in requiring the judge to inform counsel of his proposed action on instructions is to enable counsel to know the guiding principles under which their final arguments should be made. See e.g. Terminal R. Ass'n. of St. Louis v. Staengel, 122 F.2d 271, (8th Cir.), cert. den. 314 U.S. 680, 62 S.Ct. 181, 86 L.ed. 544 (1941); Dallas Ry. & Terminal Co. v. Sullivan, 108 F.2d 581 (5th Cir. 1940). Counsel for Appellant has failed to indicate how his final argument was prejudicially affected by the Court's alleged failure to inform him what instructions would be given. In any event, the case law indicates that the trial court has discretion in

deciding whether to submit an additional instruction to the jury, even though counsel have not been informed of the instruction prior to the closing arguments See Miscione v. Penn. R. Co., 284 F.2d 428, (2d Cir. 1960).

Moreover, Appellant, by stipulating that objections to the court's instructions be taken after the jury retired (Tr. 372, R. 338), ought to be held to be estopped from asserting this contention, inasmuch as the only reason for taking objections prior to the jury's retiring is to enable the trial judge to cure omissions or other defects in his instructions before the parties' final arguments. By stipulating otherwise, Appellant has prevented the court from curing the very defect which Appellant now wishes to urge as error.

Appellant's final argument under his first Specification of Error is that the trial judge erred in accepting for consideration Appellee's Additional Proposed Instruction No. 27, because it was not timely offered. (Br 15). Moreover, Appellant seems to imply that Appellee did not offer its Additional Proposed Instruction until after the jury had retired. (Br. 16). Again, Appellant is seriously mistaken. The record clearly shows that Appellee offered the instruction in question for the trial judge's consideration prior to the jury's retiring on September 8. (Tr. 375, 376, 379). Moreover counsel for Appellant also submitted additional proposed instructions

at about the same time, and therefore apparently acquiesced in the court's acceptance of proposed instructions submitted after the initial deadline date of September 6, formerly set by the trial judge. (Tr. 376). In any event, the trial judge expressly waived the deadline date for proposal of instructions and allowed them to be submitted on September 8. (Tr. 376). Furthermore, the trial judge expressly stated that he did not feel that there was any attempt made on the part of counsel for defendant to slip the instruction in question in tardily in order that it might be given undue emphasis. (Tr. 382).

In such circumstances, the trial judge did not err in accepting Appellee's Additional Proposed Instruction No. 1 for consideration subsequent to the initially ordered deadline and prior to the jury's retiring. In fact, the judge probably would have committed reversible error if he had refused to accept the proposed instruction for consideration. Wilson v. Southern Farm Bureau, 275 F.2d 819, (5th Cir.), cert. den. 364 U.S. 817, 81 S.Ct. 49, 5 L.ed. 2d 48 (1960).

In conclusion, neither the failure of the trial judge to inform counsel of his action on their proposed instructions nor his failure to refuse to accept for consideration Appellee's Additional Proposed Instruction No. 27, was, under the circumstances, reversible error.

II

THE COURT DID NOT COMMIT REVERSIBLE ERROR BY SUBMITTING TO THE JURY THE SPECIAL INTERROGATORY CONCERNING NOVATION

Appellant contends that the trial court unduly confused the jury and therefore committed reversible error by submitting to the jury an interrogatory concerning the issue of novation where, the issue of novation having been removed from the case by the trial court, no instruction defining the term novation was given. (Br. 23). Appellant again offers very little argument or authority in support of his position, and at one point, Appellant inaccurately described the chain of events occurring during the trial. Appellant asserts that the jury was sent back to deliberate upon the interrogatories and then returned again for further instructions on the interrogatories. (Br. 23). The record will show that the jury did not return for further instruction after being sent back to answer the interrogatories. (Supp. Tr. 2).

Preliminarily, it must be noted that counsel for Appellant did not specifically object to the submission of the interrogatory in question. Rather, he objected only in a very general fashion to the giving of any interrogatories:

> "I would object to the special verdict because I don't feel that there has been a showing as to why we should have this..." (Tr. 378-379)

The failure of counsel for Appellant to object specifically to the submission of the novation interrogatory was not due to a lack of knowledge by him of the text of the special interrogatories. This is conclusively demonstrated by the fact that counsel for Appellant objected specifically to the text of Interrogatory No. 4 concerning waiver of defects in cancellation. (Tr. 379). Under such circumstances, Appellant should be held to have waived the objection which he now is seeking to urge. Since counsel for Appellant gave the trial judge no opportunity to cure the alleged defect to Appellant's satisfaction, Appellant ought not now to be allowed to object that the proceedings were not satisfactory to him. Martin v. United Fruit Co., 272 F.2d 347, (2d Cir. 1959); Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.ed. 645 (1942); Hargrave v. Wellman, 276 F.2d 948, (9th Cir. 1960).

In any event, Appellee can not conceive how the confusion of the jury, if indeed any there was, could have prejudiced Appellant. It is to be noted that once proper interrogatories were submitted to the jury, the jury was able to answer them in one hour and eight minutes. (R. 340). Moreover, the jury answered the interrogatories in a fashion completely consistent with its General Verdict. (R. 392-394). Appellee could conceive that the jury might be deemed to have been prejudicially confused

if the jury's answers to the interrogatories had been inconsistent with its General Verdict. But where those answers are completely consistent with the General Verdict, Appellee cannot conceive that the jury could properly be said to have been prejudicially confused.

Substantial case law exists holding that similar errors are not prejudicially erroneous. In Diniero v. United States Lines Co., 288 F.2d 595 (2d Cir. 1961), a seaman brought suit for personal injuries allegedly sustained aboard a vessel due to unseaworthiness and to negligence of the owner. During the course of the proceedings, the trial judge submitted eight interrogatories to the jury, one of which was seriously ambiguous and confusing to the jury. After several hours of deliberation and the receipt of a number of communications from the jury seeking explanation of the ambiguous interrogatory, the trial judge withdrew all of the interrogatories, and told the jury to disregard them and bring in only a general verdict in the usual form. After further deliberations, the jury brought in a verdict in favor of the seaman, and judgment was entered thereon. The shipowner appealed, urging that the court erred in withdrawing the interrogatories. In affirming the judgment, the Court of Appeals per Medina, C.J. stated:

> There was an inherent ambiguity in question one, and it is plain enough

> that the explanation failed to remove the ambiguity. Under these circumstances it was not an abuse of discretion to withdraw the questions and give the jury an opportunity to agree upon a general verdict. As F. R. Civ. P., Rule 49(b) authorizes the submission of interrogatories to assist the jury in arriving at a verdict, it is reasonable and quite consistent with the broad powers of a federal trial judge to infer that in a proper case the interrogatories may be withdrawn. It was a matter of judgment whether to attempt some further elucidation of the question, or to declare a mistrial, or to withdraw all the questions and authorize a general verdit. We cannot say the decision made here under all the circumstances of the case was wrong...
>
> ...[T]he interrogatory causing all the difficulty here was unclear and ambiguous. The withdrawal of all the questions was for the purpose of eliminating the confusion caused by the formulation of an improper question ... Under the circumstances it was, we think, good judgment to withdraw all of the questions. Certainly we cannot say to do so was an abuse of discretion. (288 F.2d at 599-600).

In United States v. Six Dozen Bottles, Etc., 158 F.2d 667 (7th Cir. 1947), a libel was brought by the United States for the condemnation of a number of bottles of an article called "Dr. Peter's Kuriko" on the ground that the bottles were misbranded when in interstate commerce. At the end of the trial, the trial judge instructed the jury and submitted a number of interrogatories, one of which was No. 4. There was no charge in the information to which Interrogatory No. 4 was responsive; the

court submitted the interrogatory purely for its own enlightenment. The Appellate Court held that it was error for the trial court to submit the interrogatory but that such error was not prejudicial. It based its decision on the ground that the jury's answer to the erroneous interrogatory neither added to nor detracted from its answer to another properly submitted interrogatory which formed the basis for the jury's verdict, and that the jury's answer to the erroneously submitted interrogatory bore no relation to its answer to the properly submitted interrogatory.

It is submitted that the jury in the instant case was apt to be less confused than was the jury in the Diniero case (supra). This is emphasized by the fact that the jury never did answer the novation interrogatory. Furthermore, as in the Six Dozen Bottles case (supra), the interrogatory concerning novation was completely independent of the other properly submitted interrogatories. An answer to the interrogatory dealing with novation would not have affected the jury's answers to other interrogatories in any manner whatsoever. For these reasons, Appellee urges that the above two cases are in point and that any error which the trial court might have committed by submitting the novation interrogatory was not prejudicial and therefore does not warrant a reversal.

III

THE COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUBMITTING INTERROGATORY NO. 4 PERTAINING TO WAIVER, SINCE THERE WAS EVIDENCE OF WAIVER.

Appellant apparently wishes to urge on this appeal that Instruction No. 15 incorrectly stated the law. (Br. 27, 28-30). It must be noted that counsel for Appellant failed to include this as a ground for appeal in either his Motion for New Trial, (R. 407-408, 412), his "Statement of Points Upon Which Appellant Intends To Rely" (R. 433-435), or in his "Specifications of Errors" contained in his instant brief. (Br. 9-11). Furthermore, it is entirely unclear in Appellant's brief whether Appellant in fact wishes to argue this point. For these reasons, Appellant ought to be foreclosed from making this issue a contention on this appeal. United States Courts of Appeals Rules, Ninth Circuit, Rule 18(2)(d); Dower v. United Air Lines, 329 F.2d 684 (9th Cir. 1964); Greyhound Corp. v. Blakely, 262 F.2d 401 (9th Cir. 1958).

In any event, Instruction No. 15 correctly stated the law. There is no question that defects in a notice of cancellation can be waived by the insured or by one of his agents:

> Since policy provisions, requiring notice of cancellation to be given to the insured a stipulated period of time before the insurance is terminated, are for the benefit of

> the insured, they may be waived by him. Such waiver can be effected either by the insured personally or through his authorized agents. [Appelman, Insurance Law and Practice, (1st ed. 1942), §4183, pp. 714-715].

In Finley v. New Brunswick Fire Ins. Co., 193 Fed. 195 (E. D. Wash. 1911) defendant insurance company issued a fire insurance policy on plaintiff's property through its agent who for many years had represented plaintiff in looking after his insurance business in a limited way. On August 16, defendant requested its agent to cancel the policy on plaintiff's property. This request was received by defendant's agent on the morning of August 20. Later that same day, defendant's agent, assuming to act for plaintiff, took out a replacement policy with another company. On the following day, August 21, plaintiff's property was destroyed by fire. Two days later, defendant's agent rendered the replacement policy to plaintiff, informing him that they had been instructed to cancel the policy formerly issued by defendant. Plaintiff at no time received written notice of cancellation, and at first he refused to accept the replacement policy. Later, however, plaintiff did accept the replacement policy. Subsequently, he brought suit against defendant seeking to recover on the policy which had been cancelled. In addition, plaintiff brought a separate suit against the company which issued the replacement policy. The trial

judge ordered that judgment for defendant be entered. In the course of his opinion, the judge expressly declined to decide whether defendant's agent was also plaintiff's agent at the time he procured the replacement policy. The rationale of his decision was as follows:

> The [replacement] policy was taken out by [defendant's agent], assuming to act for the plaintiff, for the purpose of replacing the policy in suit, which they had been instructed to take up and return, and not for the purpose of increasing the amount of insurance on the property. This object or purpose was made known to plaintiff before he accepted and brought suit on the [replacement] policy ... [A]ssuming for the purpose of this case that [defendant's agent] had no authority to cancel the policy in suit, or to substitute another policy in its place, yet, when plaintiff was informed as to what had taken place, it was incumbent on him to elect which policy he would claim under. If [defendant's agent] acted without authority [from plaintiff], he might disavow their acts, and claim under [the policy of defendant company], or he might ratify the substitution which his agents had made in his behalf, and without authority; but manifestly he could not do both. He could not claim the benefit arising from the act of his agents in taking out a policy, and at the same time repudiate the object and purpose for which the new policy was obtained. (193 Fed. at 197).

In complete accord with the Finley case is the ecent Ninth Circuit case of Pagliero v. Merchants Fire ssurance Corp. of N. Y., 169 F.2d 375 (9th Cir. 1948). n that case, plaintiff's property, prior to April 10, 946, was insured under a policy issued by defendant

insurance company, such policy containing the usual five days notice of cancellation clause. On April 10, 1946, defendant wrote to its agent requesting it to cancel the policy. Subsequently, defendant's agent procured from another company another insurance policy covering plaintiff's property. The agent then notified defendant insurance company that the policy had been cancelled. However, the agent failed to notify plaintiff of the cancellation and substitution of the other policy until several days after fire had damaged plaintiff's property. When informed of the action taken by its agent, plaintiff asserted rights under both policies. The company which had issued the replacement policy paid a portion of the loss, but defendant company refused to pay and plaintiff brought suit. The jury returned a verdict for defendant, and plaintiff appealed. In affirming the judgment, the Court of Appeals expressly refused to decide whether defendant's agent had authority from plaintiff to cause cancellation of plaintiff's policy with defendant and procure a substitute policy. It held that independent of that question, ratification clearly appeared, and in so holding, the Court placed controlling reliance upon Finley v. Brunswick Fire Insurance Co., (supra p. 48. The Appellant's attempts to distinguish the Finley case were to no avail:

> ...[A]ppellants ... attempt to distinguish [the Finley case] from the case at bar on the ground that the authority granted the agent in the Finley case was much broader than that granted to [defendant's agent] by Appellants. Frankly, we are unable to understand in what manner the degree of power possessed by the broker could have influenced the decision of the court because it was assumed that no authority existed and the decision was bottomed on ratification. The same may also be said of appellant's second attempt to distinguish the Finley case by pointing out that the agent in that case was acting as broker for one of the parties and agent of the other. In either situation the benefit from the act of the agent arising from the taking out of the new policy could not be claimed and at the same time the object and purpose of the agent in securing the new policy, viz., replacement of the old policy, repudiated. (169 F.2d at 374-375).

Although the above-discussed cases are deeply involved with problems of ratification, it is crucial to note that deciding only the question of ratification would not have been sufficient in and of itself for the courts to have decided the cases. Rather, in both the Finley case and the Pagliero case, the result would have been the same had the policy holder purchased the substitute policy himself, instead of another's agent doing that for him. Thus, those two cases implicitly hold that purchase of or acquiescence in the purchase of a substitute policy coupled with the bringing of a claim under the replacement policy constitutes a waiver of defects in the cancellation of the former policy that the sub-

stitute policy replaced.

Appellant also contends that there was no evidence that Appellant waived any defects in the method of cancellation. (Br. 28). Appellant is clearly incorrect. Appellant admitted that Bailey E. Bell advised him in both a letter and a telephone call that he (Bell) had purchased a new or substitute policy in the amount of $15,000.00. (Tr. 335), and that he (Bell) would look to Appellant for payment of premiums on the substitute policy. (Tr. 352). Inasmuch as Appellant did not testify that he objected to Bell's demand that Appellant pay the premiums, it is clear that Appellant acquiesced in the demand. (Tr. 352). Moreover, at one point in his pleadings, Appellant admitted that Bailey E. Bell was his agent in procuring the substituted policy. (R. 130). Appellant admitted that he felt that the substituted policy was sufficient (Tr. 75, 353), and that he felt that the policy issued by Appellee was replaced by the policy which Bailey E. Bell had purchased. (Tr. 353). At one point, Appellant's admissions in his deposition made this matter quite clear:

> Q. I mean between January 7th and January 16th, did you make any inquiries, contact any insurance agents, in any way seek to either get a policy, a new policy or make sure that this was reinstated or anything of that nature?
>
> A. Bailey's was in effect. (Tr. 354).

Furthermore, Appellant brought suit against the Glens Falls Insurance Company and the Kansas City Fire and Marine Insurance Company, the joint issuers of the substitute policy, seeking to recover under the substitute policy. (R. 127).

In view of the foregoing evidence that Appellant acquiesced in the purchase of a replacement policy and actually brought a claim against the companies that issued the replacement policy, it is clear that there was sufficient evidence to warrant the submission of Instruction No. 15 and Interrogatory No. 5.

In any event, even if Instruction No. 15 erroneously stated the law, a reversal is not warranted. The jury found in Appellee's favor on two separate and independent grounds. It found that if there were any defects in the method of cancellation, they were waived by Appellant, (see Interrogatory No. 4, R. 394), and on this issue the instruction in question was material. But it also found that the insurance policy was properly cancelled, (see Interrogatory No. 3, R. 394), and on this issue the instruction in question was not relevant. [It is important to note that the jury did not find that there were in fact any defects in cancellation; it merely found that on the assumption that there were defects, they were waived. (R. 394)]. Such being the case, the fact that there was error in the instruction pertaining to the issue of

whether any defects in cancellation, assuming there were such defects, were waived does not warrant a reversal, because the jury found separately and independently of that issue that there was a proper cancellation. See analysis of Holloway v. Dunham, on p. 36-38 supra.

Appellant next argues that the jury's answers to interrogatories No. 4 and No. 5 were inconsistent. The text of the interrogatories and the jury's answers as follows:

> "Interrogatory No. 4. Did the defendant insurance company, through its agent, cancel the insurance policy?
>
> Answer to Interrogatory NO. 4
>
> Yes
> (Yes or No)
>
> Interrogatory No. 5. If there were any defects in the method of cancellation, did plaintiff waive such defects?
>
> Answer to Interrogatory No. 5
>
> Yes
> (Yes or No)
> (R. 394)

Appellant is clearly mistaken. The jury, by answering No. 5 in the affirmative did not assert that there were in fact any defects. It merely asserted that, even if one were to assume that there were defects, then they were waived.

Further, the court has a strong duty to take a view of the case which makes the jury's answers to

special interrogatories consistent. It is the strong duty of the courts to read answers to interrogatories as being consistent if such a reading is possible. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.ed. 2d 798, rehearing denied 369 U.S. 882, 82 S.Ct.1137, 8 L.ed.2d 284, motion denied 371 U.S. 803, 83 S.Ct. 15, 9 L.ed. 2d 51 (1962); Gallick v. B. & O.Ry. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.ed. 2d 618 (1963). It is submitted that the court should construe the answers to the interrogatories in the manner heretofore suggested and thereby find them to be consistent.

Lastly, Appellant suggests that Appellee was deficient in not pleading waiver as an affirmative defense. (Br. 28). First of all, it should be noted that the issue of whether or not any possible defects in the notice of cancellation were waived was impliedly pleaded by Appellee when it pleaded its affirmative defense of cancellation. (Ree R. 180). The issue was also implicilty included in the court's generalized statement of the cancellation issue at page 7 of the Pretrial Order in the following words, "Whether or not the Central Mutual Insurance Company policy was cancelled effective January 4, 1965;". (R. 222). There was no other way for Appellee to have responsively pleaded the waiver issue, since Appellee's complaint did not allege defects in the notice of cancellation. (R. 307, 125-132).

Therefore, in view of the rule that pleadings are to be most strongly construed in favor of the pleader, the issue of waiver of defects in the notice of cancellation ought to be held to have been included in the affirmative defense of cancellation that was pleaded by Appellee. Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963).

Appellee objects to Appellant's raising of this point at this, the latest of possible times. At no previous time whatsoever has Appellant mentioned this omission, including the time at which the court instructed the jury on waiver. (Tr. 376-377). Appellant states that the question of waiver arose for the first time when proposed instructions were offered. (Br. 28). Again, Appellant is seriously mistaken. The record indicates that the question of waiver was raised in Appellee's Opening Argument. (Tr. 27).

Appellee again raised the issue of waiver of cancellation in a legal memorandum duly submitted to the trial court long prior to the trial. (R. 278-281). Furthermore, Appellee introduced, without objection by Appellant, a very substantial amount of evidence relating to the issue of waiver. This evidence related to the acquiescence of Appellant in the purchase of a replacement policy and his bringing of a claim against the company which issued the replacement policy. [See discussion supra

p.52-53;also see Tr. 75, 352, 353, 354].

Indeed, this is an instance where Rule 15(b) F.R. Civ. P. ought to be invoked:

> "When issues not raised by the pleadings are tried by ... implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings..."

This rule is applicable to defenses as well as to claims. Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963). Moreover, this rule has been held applicable to the defense of waiver. Pasquel v. Owen, 186 F. 2d 263 (8th Cir. 1950).

Appellee urges the court to hold that the issue of waiver was tried by implied consent of the parties inasmuch as Appellee's counsel failed to object on this ground to: (1) the statements concerning waiver that Appellee's counsel made in his opening argument; (2) the introduction of substantial evidence that there was a waiver of the notice of cancellation by Appellant; (3) the submission of an instruction on waiver to the jury.

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUBMITTING THE INTERROGATORIES TO THE JURY

In Appellant's fourth Specification of Error, he contends that the trial court erred in submitting interrogatories to the jury because such interrogatories were misleading, confusing, and ambigous. (Br. 31). Appellant

supports this contention with no case authority and virtually no argument. The thrust of what argument that he does offer seems to be that since the jury did not initially answer the interrogatories and since the jury's answers to Interrogatories No. 4 and No. 5 were inconsistent, then the jury must have been confused. (Br. 31).

Preliminarily, it must be noted that in the trial court, Appellant did not object to the submission of the interrogatories on the ground that they were misleading, confusing, and ambiguous. (Tr. 378-379). Furthermore, as has previously been pointed out, Appellant's failure to object on this ground was not a result of a lack of knowledge of the text of the interrogatories. (See previous discussion of this point, p. 42-43 supra). That counsel for Appellant had knowledge of the text of the interrogatories is conclusively demonstrated by the fact that he objected specifically to the text of Interrogatory No. 4 pertaining to waiver of defects in cancellation. (Tr. 379). Therefore, Appellant ought not be permitted to raise this ground for objection on this appeal. Martin v. United Fruit Co., 272 F.2d 347 (2d Cir. 1959).

Furthermore, Appellant waived any objections to the submission of the interrogatories when he insisted that the jury be ordered to answer them:

> THE COURT. Counsel, with reference to the special verdict interrogatories that were submitted, is there any thinking on the part of either counsel that the interrogatories should be answered notwithstanding the verdict which has been returned?
>
> MR. DELANEY: I will waive the necessity of filling out the special interrogatories, Your Honor.
>
> MR. TALLMAN: No, Your Honor. The interrogatories were submitted and they should be answered. (Supp. Tr. 2).

In any event, Appellant's argument that the trial court committed prejudicial error by submitting the interrogatories must fail, for three reasons. First, since the jury's answers to Interrogatories No. 4 and No. 5 were not inconsistent, it does not appear that they were confused by those two interrogatories. (See full discussion of this point on p.54-55 supra). Second, Appellant has been completely unable to demonstrate that he has suffered any prejudice by the inadvertent submission of the interrogatory that pertained to novation, since the jury's answers to the interrogatories were very rapidly given after the jury was returned to the jury room specifically to answer the interrogatories and since the answers to the interrogatories were completely consistent with the general verdict. (See full discussion of this point on p.43-46 supra). Third, the trial judge has a very large discretion in determining whether to submit interrogatories to the jury, and Appellant has failed to

establish that the trial judge grossly abused this discretion. (see full discussion on this point infra, p.60-61).

The second argument which Appellant urges under this Specification of Error is that the trial court should not have submitted any interrogatories because no showing that they were necessary was made. (Br. 31). Appellant argues that this was merely "a simple suit for money damages based upon an insurance policy and a fire loss," and that therefore interrogatories were not necessary. (Br. 31).

Appellant entirely misconceives the law governing the question of whether interrogatories ought to be submitted. Rule 49(b) of the Federal Rules of Civil Procedure indicates that the question of whether to submit interrogatories to the jury is left to the discretion of the trial judge; furthermore, at no point does the rule suggest that any special showing is necessary in order for interrogatories to be submitted:

> "The court may submit to the jury together with appropriate forms for a general verdict, written interrogatories..." [Rule 49(b) F. R. Civ. P., emphasis added]

Furthermore, the case law is replete with statements by the courts that the trial judge has wide discretion in determining whether and in what form to submit interrogatories. See e.g. Diniero v. United States Lines Co., 288 F.2d 595 (2d Cir. 1961); Texas Pac. Ry. v. Griffith,

265 F.2d 489 (5th Cir. 1959); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951); DeEuginio v. Allis-Chalmers Mfg. Co., 210 F.2d 409 (3rd Cir. 1954). Professor Moore seems to be in accord when he states, referring to Rule 49(a):

> ...The court has complete discretion as to whether a special or a general verdict is to be returned. As with other discretionary acts, this should not be reviewable, except perhaps for gross abuse, which could rarely be shown. (5 Moore, Federal Practice, §49.03).

In view of the fact that the court adequately instructed the jury on the interrogatories (See Appellant's admission on p. 31 of his Brief) it is submitted that the trial court cannot reasonably be said to have abused its discretion in submitting such interrogatories.

V

CONCLUSION

Appellee contends that the trial court committed no errors, and therefore respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted in Anchorage, Alaska, this 25th day of August, 1967.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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